UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

September 3, 1997

UNITED STATES OF AMERICA, Complainant	)	
	)	8 U.S.C. 1324a Proceeding
vs.	)	
	)	OCAHO Case No. 97A00098
ACRA MANOR CORP., D/B/A ACRA MANOR RESORT, F/K/A ANDREWS AVE., Respondent	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

I. Background

On February 21, 1997, the United States Department of Justice, Immigration and Naturalization Service (complainant/INS), issued and served upon Acra Manor Corp. d/b/a Acra Manor Resort f/k/a Andrews Avenue Restaurant Corp. (respondent) Notice of Intent to Fine NYC 96 E0 000 302.

That single-count citation alleged that respondent had committed 46 paperwork-type violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a, for which civil money penalties totaling $13,800 were assessed.

In Count I, complainant alleged that respondent had violated the provisions of 8 U.S.C. § 1324a(a)(1)(B) by having failed to ensure proper completion of section 1 of the Forms I-9 and also by having failed to properly complete section 2 of the Forms I-9 for each of the 46 individuals named therein, all of whom were hired by respondent after November 6, 1986, for employment in the United States. Civil money penalties of $300 were assessed for each of those 46 alleged violations, or a total of $13,800.

The wording of the NIF clearly advised the respondent of its right to file a written request for a hearing before an Administrative Law Judge assigned to this Office provided that such written request be filed within 30 days of its receipt of the NIF.

On March 4, 1997, respondent filed a written request for hearing.

On April 22, 1997, complainant filed the single-count Complaint at issue, realleging the 46 violations set forth in Count I of the NIF, as well as the requested $13,800 total civil money penalties sum.

On April 25, 1997, a Notice of Hearing on Complaint Regarding Unlawful Employment, along with a copy of that Complaint, were mailed to the respondent by certified mail. Respondent acknowledged receipt of the Complaint on April 28, 1997.

On May 28, 1997, respondent's president Val Fede, appearing without counsel, filed a document entitled Motion to Dismiss Complaint Against Acra Manor Corporation. Attached to that document is a single-page letter, dated May 21, 1997, from Fede stating that "In answer to the service of complaint dated May 2, 1997 against Acra Manor Corp. I hereby deny these allegations."

In the May 21, 1997 letter, also, Fede requested that the Complaint be dismissed because of allegedly erroneous oral instructions received from INS Special Agent McPoland on August 5, 1996 concerning the proper completion of the Form I-9, and because of having "fully complied in obtaining all identification, updating information and maintaining records on every employee". Fede further stated that "[i]t seems that they asked him to fill out the I-9's in a manner that, though unintentional, did in fact incur a violation." Respondent has also submitted copies of 37 Forms I-9 relating to the individuals named in Count I.

On June 10, 1997, complainant filed a pleading captioned Complainant's Motion to Dismiss Certain Names in Complaint and For Summary Decision as to Liability on the Remaining Names in the Complaint. In that motion, complainant requested that the eight (8) allegations involving the following individuals be dismissed:

7. Maria Deleo
14. Christopher Fremgen
27. Shanon McGinley
31. Karin Overbaugh
33. Brandon Perino
38. Chelsea Sitcer
39. Seith Smith
41. Bevin Spencer

Complainant has indicated that the respondent was not required to retain Forms I-9 for those eight (8) individuals. Accordingly, those names are hereby ordered to be and are deleted from Count I of the April 22, 1997 Complaint.

Complainant seeks summary decision on the alleged facts of violation concerning the remaining 38 violations at issue.

II. Standards of Decision

The pertinent procedural rule governing motions for summary decision in unlawful employment cases provides that "[t]he Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, and material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (1996).

Section 68.38(c) is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal court cases. For this reason, federal case law interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before this Office. United States v. Limon-Perez, 5 OCAHO 796, at 5, aff'd, 103 F.3d 805 (9th Cir. 1996).

The purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact and is properly regarded "not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as an inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

An issue of material fact is genuine only if it has a real basis in the record and, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); United States v. Alberta Sosa, Inc., 5 OCAHO 739, at 5 (1994).

The party seeking summary decision assumes the initial burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. Celotex Corp., 477 U.S. at 323. In determining whether the complainant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the respondent. Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1223 (2d Cir. 1994).

Once the movant has carried this burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." Id.; Fed. R. Civ. P. 56(e). The procedural rule governing motions for summary decision in OCAHO proceedings explicitly provides that "a party opposing the motion may not rest upon the mere allegations or denials of such pleading . . . [s]uch response must set forth specific facts showing that there is a genuine issue for trial." 28 C.F.R. § 68.38(b) (1996).

III. Discussion

IRCA makes it unlawful for a person or entity to hire for employment in the United States, after November 6, 1986, any individual without complying with the employment verification system, which serves to establish the individual's identity and employment eligibility at the time of hire. 8 U.S.C. § 1324a(1)(B)(i), § 1324a(b).

The task of complying with the employment verification system is accomplished by completing the Form I-9, officially known as the Employment Eligibility Verification Form.

Regulations implementing the employment verification system require that employers ensure that employees properly complete section 1 of the Form I-9 at the time of hire and that they also present documentation establishing their identity and employment eligibility. Employers are also required to examine the documentation and complete section 2 of the form within three (3) days of hire. 8 C.F.R. § 274a.2(b)(1)(i), § 274a.2(b)(1)(ii) (1996).

The employer must also retain the Form I-9 for a period of three (3) years from the date of hire or for one year following the date of an employee's termination, whichever is later. 8 C.F.R. § 274a.2(b)(2)(i) (1996). The regulations also require that an employer shall be provided with at least three (3) days notice prior to an inspection of the Forms I-9 by officers of the INS. 8 C.F.R. § 274a.2(b)(2)(ii) (1996).

In order to prove the facts of violation alleged in Count I, complainant must make a prima facie showing that:

1) respondent had hired for employment in the United States;

2) the individuals named in Count I;

3) and did so after November 6, 1986; and

4) that respondent failed to ensure that the individual properly completed section 1 of the Form I-9 and/or respondent failed to properly complete section 2 of the Form I-9.

In support of its Motion for Summary Decision, complainant has provided the Declaration of Special Agent John McPoland; a copy of the Notice of Inspection, Exhibit 1; a copy of the Employer Eligibility Verification Form Investigative Inspection Worksheet, Exhibit 2; copies of the 38 Forms I-9 at issue, Exhibit 3; and a copy of a document entitled Certificate of Amendment of Certificate of Incorporation, Exhibit 4. Those documents have provided the following facts.

On August 5, 1996, INS Special Agents John McPoland, Peter Tracy and Hugh O'Connor, went to respondent's place of business, and served a Notice of Inspection upon John Fede, the manager and son of Val Fede, the president of the respondent firm. The agents also provided Fede with a copy of the INS Handbook for Employers (INS Handbook).

Agent McPoland denies having given oral instructions for completing the Form I-9 to Fede or any other employees during his initial visit, contrary to respondent's allegations that he had done so.

The Notice of Inspection advised respondent that the INS had scheduled a compliance inspection and educational visit for August 12, 1996, some seven (7) days later. After two (2) postponements, the compliance inspection was conducted on August 20, 1996.

During that inspection, Fede presented approximately 78 Forms I-9, 38 of which contained deficiencies.

Fede completed a standard INS document entitled Employer Eligibility Verification Form Investigative Inspection Worksheet, which lists the date of hire and termination for each employee hired and whether a Form I-9 was completed. A review of that document discloses that respondent had hired the 38 individuals listed in Count I for employment in the United States and did so after November 6, 1986. A visual inspection of those 38 Forms I-9 indicates that section 1 and section 2 were not completed properly, as complainant has alleged.

Based on the foregoing, it is found that complainant has demonstrated each element of its prima facie case.

Respondent's rebuttal includes the following facts. On August 5, 1996, the date upon which Special Agents McPoland, Tracy, and O'Connor visited Acra Manor, John Fede, respondent's manager, accepted service of the Notice of Inspection. Fede has indicated that he was unfamiliar with the Form I-9 procedure and that he was informed by Agent McPoland that Fede could unassistedly complete a Form I-9 for each employee.

Unbeknownst to Fede, Acra Manor retained Forms I-9 for its employees in a file maintained by respondent's employee and payroll manager, Alyson Savino. In August, 1996, Ms. Savino was on extended sick leave at her parent's residence in Florida. Fede believed that he could supply the INS with the requested documentation without Ms. Savino's assistance and did not contact her until after the NIF was served.

Between August 5, 1996 and August 20, 1996, Fede personally completed Forms I-9 for Acra Manor's employees with forms provided by the INS agents during their initial visit on August 5, 1996. Obviously, each of the Forms I-9 that Fede attempted to complete were deficient since the employee, not the employer, must complete section 1 of the Form I-9.

Fede has conceded that the Forms I-9 which he personally completed and tendered to the INS were deficient. He further indicated that if the "agents had informed [him] that there was a violation of any kind or that the forms couldn't be filled out by me personally . . . I would have immediately called Ms. Savino . . . and the correct forms could have been provided."

Based on the foregoing facts, it is clear that respondent seeks to avoid liability for the alleged paperwork violations by urging that complainant is equitably estopped from citing respondent for these alleged infractions because of respondent's reliance upon Agent McPoland's oral statement that an employer may complete the Form I-9 without the employee(s) assistance. As we have seen, Agent McPoland denies having provided any oral instructions to respondent concerning the procedure for completing the Form I-9, other than providing the INS Handbook.

Respondent's estoppel claim fails as a matter of law. While the Supreme Court has declined to state that estoppel may never be asserted against the Federal Government, it has held that the Federal Government "may not be estopped on the same terms as any other litigant." Heckler v. Community Health Services of Crawford County, 467 U.S. 51, at 60 (1984); United States v. RePass, 688 F.2d 154, 158 (2d Cir. 1982) (equitable estoppel defense not available against the United States except in most serious circumstances).

The U.S. Court of Appeals for the Second Circuit has indicated that "the government may be estopped only in those limited cases where the party can establish both that the government made a misrepresentation upon which the party reasonably and detrimentally relied and that the government engaged in affirmative misconduct." City of New York v. Shalala, 34 F.3d 1161, 1168 (2d Cir. 1994); INS v. Miranda, 459 U.S. 14, 19 (1982)(per curiam); see also Schweiker v. Hansen, 450 U.S. 785, 788-90 (1981) (per curiam).

OCAHO rulings have similarly placed a heavy burden upon respondents seeking to avoid liability based upon claims of estoppel. United States v. Corporate Loss Prevention Assocs., 6 OCAHO 908 (1997) (oral representations cannot form the basis of an equitable estoppel defense); United States v. De Leon-Valenzuela, 6 OCAHO 866 (1996) (party must establish affirmative misconduct beyond mere negligence); United States v. Scotto Bros. Woodbury Restaurant, 3 OCAHO 584 (1993).

At most, respondent's allegations demonstrate negligence on the part of INS officials, but they do not rise to the level of affirmative misconduct that is needed to underpin an estoppel claim. Azizi v. Thornburgh, 719 F. Supp. 86, 98 (D. Conn. 1989), aff'd, 908 F.2d 1130 (2d Cir. 1990) (misrepresentations made by Immigration Judge, while negligent, are not sufficient to demonstrate serious misconduct).

In addition, respondent has not demonstrated that it reasonably relied to its detriment upon the alleged improper advice it supposedly received from INS Agent McPoland.

The wording of the Form I-9, clearly contains directions on the proper method for its completion. For example, section 1 is entitled "Employee Information and Verification.", and immediately after that title are the words "To be completed and signed by employee at the time employment begins".

Because the instructions on the Form I-9 clearly conflict with the erroneous oral instructions allegedly provided by Agent McPoland, it would have been reasonable for respondent to conduct further investigation as to its Form I-9 paperwork requirements, especially in view of the fact that respondent had more than two (2) weeks in which to do so and it also had available the INS Handbook for further guidance.

Beyond these allegations, there is nothing in the record indicating the presence of a genuine issue of material fact as to the estoppel claim. And respondent's belated tender of correct Forms I-9 relating to the individuals named in Count I is insufficient to avoid liability as well.

As noted earlier, IRCA requires that the employer be provided at least three (3) days notice prior to the commencement of a Forms I-9 compliance inspection. INS complied with that requirement since the service of the Notice of Inspection was effected on Monday, August 5, 1996. Therefore, respondent was required to make its Forms I-9 available for inspection no later than Thursday, August 8, 1996. In this case, the INS provided respondent, some 12 additional days, or until August 20, 1996, to provide its Forms I-9 for inspection.

Therefore, because complainant has demonstrated that there is no genuine issue of material fact with regard to any of the 38 remaining violations set forth in Count I, and because respondent has failed to show that there is a genuine issue of fact for trial, complainant's June 10, 1997 Motion for Summary Decision is hereby granted as it pertains to respondent's liability for those remaining 38 section 1324a(a)(1)(B) facts of violation in Count I.

In lieu of conducting an evidentiary hearing on the sole remaining issue, that of assessing the appropriate civil money penalties for these 38 violations, the parties are hereby instructed to submit concurrent written briefs, to be filed no later than Friday, September 26, 1997, containing recommended civil money penalty amounts for those violations. In doing so, the parties will utilize the five (5) statutory criteria listed at 8 U.S.C. § 1324a(e)(5), size of the business, good faith of the employer, seriousness of the violation, whether or not the individuals were unauthorized aliens, and the history of previous violations.

Joseph E. McGuire
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 1997, I have served copies of the foregoing Order Granting Complainant's Motion For Summary Decision to the following persons at the addresses shown, in the manner indicated:

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